Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	MM Docket No. 92-259
Television Consumer Protection	)	
and Competition Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

COMPETITIVE CABLE ASSOCIATION

Comments

COMPETITIVE CABLE ASSOCIATION

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SUMMARY

The Competitive Cable Association believes that must-carry will not survive court test and that retransmission will, in that event, also fall because it is part of a package of choice that the Congress means to extend to the broadcast industry. But the process at the Commission cannot wait on court test and must go forward.

The Association recites some of the early history of retransmission consent and urges that logic, precedent, and attainability drive the process to insisting that retransmission consent means program-by-program clearances. CCA asks the Commission to adopt a precise form of consent and suggests appropriate language. The language of the suggested form of consent contemplates that program clearances will be accomplished by the broadcaster and the Association believes that to be fair and more workable than requiring the cable operator to go about that transactionally difficult process. CCA also urges the Commission to turn away from its inclination to leave the resolution of retransmission consent disputes to the courts--"That...will doom...retransmission consent..to a bog of delay and a hodge-podge of decision." With respect to the Congressional direction that retransmission costs be contained so as to not impact unreasonably on basic cable rates, CCA believes that the Commission should consider capping the costs.

Finally, it is believed that the uneasiness between broadcast and cable will persist beyond the new Act and the rules and regulations that result from the Commission's deliberations. The Competitive Cable Association believes that alternate solution must be sought and is available. Simply, broadcasting needs cable coverage, but its demand for carriage on the existing cable industry is not sustainable.

The remedy, in view of CCA, is to permit broadcasting to own its own cable facilities. That cross-ownership is now barred not only by Commission rule but also by the 1984 Cable Act. The Commission is urged to return to the Congress with a request to eliminate the ban, coupling that request with the assurance that broadcasting's entry into the cable business would also cure the problems that flow from cable's current monopoly status.

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The Competitive Cable Association now responds to the Commission's invitation to comment on its proposals in the captioned proceeding. The Association--also sometimes referred to as CCA--represents alternate providers of video and audio distribution services. It is wide open to membership by wireless cable operators, telephone companies, second or competitive wired cable systems, ITFS arrangements, SMATV installations, 28 GHz proponents, and other distributors, no matter the technology.

Retransmission Consent coupled with Must-carry is meant to give Broadcast TV a Choice--if one goes down on Court Appeal, both are Doomed

At the outset--and despite the special pleading of the Notice, ¶2, that "...the inclusion of both issues [retransmission

consent and must-carry] in a single proceeding is simply a matter of administrative convenience and not an indication that the matters are not severable"--the issues are intertwined and neither can survive without the other. In fact, and repeatedly throughout the Notice, the Commission does retreat from its opening position. Thus, for example, at ¶48, "...the implementation of the new Section 325(b) and the new Section 614 must be addressed jointly" because "...commercial television stations are required to choose between retransmission consent and must-carry rights...." And that's as it should be--the Congress intended for stations to have a choice. If must-carry fails--and it is currently being tested--choice will be eliminated and the legislative rationale will no longer suffice to support a retransmission consent requirement.

Carriage of broadcast TV is Good Cable Business, but Must-Carry is Resisted as matter of Principle

Except as a matter of First Amendment principle, must-carry is not of important consequence to the established cable industry nor to the members of CCA. That is the case because the overwhelming preponderance of what the new law demands by way of carriage is already being performed--the carriage of broadcast signals does expand service offerings and does make good business sense. But, as a matter of law, no cable operator or other distributor of speech should be compelled to deliver the messages of other people. That seems simple First Amendment prescription. And, so, the Competitive Cable Association expects must-carry, as

on two earlier occasions, to strike out again and to carry retransmission consent with it.

Commission has Recurrent and Recent experience with Must-Carry, will be Expert at bringing off credible Execution of Congressional direction

But running the judicial course will take time, and the Commission must for now do its best to respond to the legislative direction. As to must-carry, the agency has a long-standing and seemingly unbroken interest in fixing that obligation on cable (see, as recently as Further Notice of Proposed Rule Making in MM Docket No. 84-1296, 6 FCC Rcd 4545, 4565, released July 12, 1991--"...the Commission...recommended in 1990 that Congress either reinstate must carry rules or eliminate the compulsory license and give broadcasters a clearly defined right to bargain for compensation for retransmission of their programming."), and even had under way, until the Notice now being considered here, its own third attempt to put over must-carry (see Notice, fn. 2--"In light of the mandatory carriage requirements of the 1992 Act, we terminate that proceeding.") With all that experience, the Commission will, with some updating, have little trouble in reimposing must-carry requirements.

Retransmission Consent has Special and Uncommon difficulties; Commission experience only Limited and not Recent

Retransmission consent is, however, a fresh battleground with its own bundle of uncommon difficulties. The Commission is

not entirely unfamiliar with those problems, but has had only limited and not recent experience. To refresh memory, CCA will respectfully recite a small bit of history as a necessary lead-in to what the Association will recommend as an ultimate and straightforward solution to the never-ending beating around the bush that plagues the evolution and development of these alternate technologies, seemingly whenever there's a lull.

NTIA's proposal for Retransmission Consent in this brief Historical Recitation of Commission's Experience with and Handling of consents

In early 1979, when the Commission was considering, and was on the verge of repealing its syndicated program exclusivity requirements and its rules limiting cable's ability to import distant stations, the National Telecommunications and Information Administration upset the Commission's deregulatory timetable (the Commission's staff publicly charged that the proposal was "dumped in at the last moment in order to derail the Commission's carefully prepared program to end cable controls") by the last-minute intrusion of a proposal that the Commission adopt and impose retransmission consent. But another executive agency, the Justice Department, opposed the NTIA proposal on the ground that the FCC did not have the legal authority to adopt retransmission consent. The U.S. Copyright Office also opposed. And, as a seemingly ultimate note, the Congressional Research Service of The Library of Congress, in a monograph dated November 26, 1979, declared that retransmission consent was inconsistent with the 1976 Copyright Act

that established a compulsory license for cable TV's carriage of broadcast stations. Simply, it was said, the compulsory license tells a cable operator that the consent of a station is not required; retransmission consent, on the other hand, demands the very consent that the Copyright Act says is unnecessary.

Commission rejects NTIA's proposal; retransmission consent found to be Incompatible with Compulsory Copyright License and also Unworkable

Understandably, the Commission rejected retransmission consent (Report and Order in Dockets 20988, 21284, 79 FCC 2d 663 (1980). At 811, the Commission found retransmission consent to be incompatible with the compulsory license established in the 1976 Copyright Act. Thus, "[t]o preserve the statutory ceiling on [copyright] fees, there cannot be a contrary FCC regulation which empowers the broadcaster...to extract greater fees." Understandably, too, because the Commission had had a totally disastrous experience with retransmission consent when it was, with misgiving, tried as a stop-gap device in 1968.

"Unworkable" in Commission's Experience with Retransmission Consent in 1968-70

In that year, 1968, the Commission adopted a Notice of Proposed Rulemaking in Docket No. 18397, 15 FCC 2d 417 (December 12, 1968), effectively freezing the further processing of applications to expand cable TV, but proposing to allow certain extensions in those cases where retransmission consent could be obtained. Id.

at 437. But, cable was unable thereafter to engineer more than a couple of suitable consents (from 24 FCC 2d 580, 581 fn. 5: "Retransmission consent has been supplied to CATV operators and approved by the Commission on a limited basis in two proceedings. Tri-Cities Cable TV, Inc., FCC 70-394, ___ FCC 2d ___ (1970); Top Vision Cable Company, FCC 69-895, 18 FCC 2d 1051 (1969)), and the experiment was later dubbed a failure (from 79 FCC 2d 663, 675: "...our 'previous unsuccessful effort to implement a retransmission consent program'").

From Outset of its Experience with Retransmission Consent, Commission insisted on Program-by-Program Clearances

The 1968 adventure into retransmission consent is, however, significant for the Commission's having that early zeroed in on the principal ingredient of retransmission consent--that is, that a broadcast station may give a quit-claim deed (i.e., it can say "sure, I give my consent for what it's worth"), but it cannot, customarily, consent to extended carriage of individual programs. That is the case because a broadcast station is ordinarily barred by its network affiliation agreement or syndicated program contract from arranging with a cable system (i.e., consenting to retransmission) to carry "The Simpsons" or "The Cosby Show" or whatever (possibly excepting small segments of locally-produced news) for money or other valuable consideration. (See BROADCASTING MAG., Feb. 17, 1992, at 4: "...the language of contracts between program suppliers and program carriers routinely contains clauses prohibit-

ing 'sub-lease or relicense of any program licensed within'"). Bans on such retransmission consent (or relicensing) are generally included in program agreements to avoid the kinds of service extensions that blur markets. Network and syndicated programming are sold market by market. Since cable TV does blur markets, program suppliers must be assumed to be opposed to their distributors giving such retransmission consents. That is complete explanation for the failure of the experiments under the 1968 retransmission proposal--cable TV could not secure appropriate program consents.

The Commission was early tuned to program property rights. And when retransmission consent was adopted in 1968, the Commission declared that consent had to be obtained program by program. Thus, from the dissenting statement of Chairman Hyde and Commissioner Cox in Top Vision Cable Co., 18 FCC 2d 1051 (1969), the following is quoted with approval from the Commission's January 17, 1969 order, FCC 69-54:

> ...the proposed retransmission consent requirement is intended to eliminate the unfair competition aspect, a so-called blanket "quit claim" authorization by the originating station (e.g., "authorization insofar as this station can give it") would not be sufficient, but rather there must be express retransmission authorization by the originating station of the program, programs, or series, as appropriate.

NTIA affirms Unavoidability of Program-by-Program Clearances

This concept of program-by-program consents vested even more firmly with the urgent importunings of NTIA in 1979. Thus, NTIA argued (quote, underlining added, is from 79 FCC 2d 663, 774):

> ...that under its retransmission consent proposal it would be the broadcaster, rather than the cable operator, that would be required to secure from the copyright owner the right to distribute programs to its service area as enlarged by cable.

And from the same Report and Order, at 775 (underlining added):

> NTIA concedes that the legislative intent [of the 1976 Copyright Act] was clearly not to have the system operator negotiate directly with the copyright owner; however, it re-emphasizes that its proposal would only require the system to negotiate with the originating broadcaster; the originating broadcaster would negotiate directly with the copy-right owner.

And this, from a February 6, 1979 speech by NTIA Deputy Assistant Secretary Paul Bortz to the Association of Independent Television Stations, p. 11 (underlining added):

> Requiring consent of the originating station for cable retransmission of non-network programs would force those supplying signals to cable to enter the program marketplace and compete with local broadcasters for the right to distribute programs in the areas served by cable. This way, the originating station could not give retransmission consent to cable unless it had bargained with the program owner and paid for that distribution right.

The pattern, then, of what retransmission consent has come to mean

is arguably fixed by this unfolding of history. With rejection by the deregulating FCC in the late 1970's, the concept was next picked up in succeeding legislative proposals, prominently advanced in earlier Congresses by ex-Congressman Lionel Van Deerlin, and has finally matured into legislation with the 1992 Cable Act.

Copyright holder response underlines Dilemma; what Form should a Suitable Consent take under New Act?

This quick touching of the historical mountain-tops easily explains why early responses by program suppliers to this next phase of retransmission consent are mixed. Some say that they will not charge broadcasters for a piece of the retransmission consent money (ELECTRONIC MEDIA, Dec. 7, 1992, at 1, col. 1), but the response is unmixed to the extent that it is now appropriate to observe that they're all thinking about it, id., or perhaps rethinking it. Compare BROADCASTING MAG., Feb. 17, 1992, at 17 where "...a spokesman for King World said the syndicator is 'evaluating' retransmission consent and 'believes that copyright holders should be compensated'" with ELECTRONIC MEDIA, Dec. 7, 1992, at 1, col. 1 where it is reported that "...King World Productions said last week that they won't seek a share of stations' income, if any...."

To serve Purpose of Act, Commission may have to O.K. Quit-claim; should then also consider Immunity to Broadcaster from Action by Program Supplier; but latter seems Beyond Commission Authority

Clearly, if retransmission consent fees end up passing

through to program suppliers, the 1992 Cable Act will not have served its purpose, which is to provide a second revenue stream to broadcast stations. So, if the Commission buys into the proposal that a quit-claim consent from the station will be sufficient to satisfy the retransmission requirement, it should at the same time consider providing a defense by declaring that, despite any contrary terms in a contract, a program supplier has no right of action against the station to recover damages for having given the consent. But, that seems beyond the Commission's power and, in any event, history may be said to have outdistanced that interpretation of retransmission consent.

Leaving resolution of Disputes to Courts will Doom Meaningful application of Retransmission Consent

The Commission is obviously troubled by the dilemma. At ¶64 of the Notice, it declares that the cable system, even where it has the consents of the program suppliers, must also get consent from the station. No quarrel with that. But it ducks the more difficult questions by soliciting suggestions (¶65) on whether copyright holder consents are required under various contract language alternatives. The Commission is, further, seemingly inclined, ¶57 of Notice, to leave disputes over the suitability of retransmission consents to resolution "...in a court of competent jurisdiction...." That, it is respectfully suggested, will doom the application of retransmission consent requirements to a bog of delay and a hodge-podge of decision.

History, Logic, and Attainability Drive the process to Demand program-by-program Clearances by Broadcaster

All things considered, the Commission should specify the precise wording of an acceptable retransmission consent. Thus: "Station _____ hereby consents to the carriage on your cable system, I.D. #_____, of each and every program broadcast by our station during this next 3-year period, ending _____." This would entail, for the broadcaster, the task of securing clearances from all of its program suppliers. But, it is easier--and fairer, in view of the added revenue stream--for the broadcaster to clear program schedules--the cable operator is not even likely to know who all the copyright holders are and, in any event, the formidable transactional costs of going through the clearance process for the number of stations seeking retransmission carriage are what the compulsory copyright license was in the first place designed to avoid.

Containing the Impact of Retransmission Consent on basic cable Rates

The process of fleshing out the legislation is further besieged by the Congressional direction that retransmission costs to the cable operator be contained so as to not unreasonably impact rates for basic cable service. More particularly, ¶66 of the Notice recites how the Commission is required "...to consider...the impact of retransmission consent on rates for the basic service tier and to ensure that...retransmission consent regulations do not

conflict with...[the] Section 623(b)(1) obligation 'to ensure that the rates for the basic service tier are reasonable'." The Commission goes on to record its view that it has wide-open discretion on how to manage this feature of rate regulation, and then consigns it to the rate proceeding that is now elsewhere also under way in MM Docket 92-266, Notice of Proposed Rulemaking, released December 24, 1992.

"Impact on rates" not a meaningful direction; Commission seems unavoidably Driven to Capping retransmission Costs

The direction to contain the impact of retransmission consent costs on basic cable rates seems too nebulous an instruction to warrant expecting more from the Commission than a merging of those costs into other expenses of cable operation. The logic of retransmission/must-carry promises that independents (unless they are strong and/or on a V channel) will opt for must-carry. That would leave 600 or 700 network affiliates and desirable independents in a pool likely to demand payment for retransmission consent. And the consideration for those consents is likely to range across a medley of arrangements from money to promotional deals or combinations of agreeable compromises. Given that, the Commission will be hard-pressed to do a meaningful job of monitoring the payments for their impact on the thousands of cable systems that cluster around those stations. Respectfully, it is submitted, there are enough vaguenesses already embedded in the 1992 Cable Act. And the Commission should, in this instance, accordingly

consider imposing an enforceable cap on the size of retransmission consent payments.

In establishing Cap, broadcast Retransmission costs not Equatable with costs of contracting for Cable Networks

It will be no escape for the Commission to measure reasonable retransmission costs for broadcast signals against cable's payments for cable network programming. The two classes of programming have substantially different features and demand different value appraisals. For example, the deal by a cable system for the carriage of a cable network generally comes with an added return to the system in the form of availabilities for local ad insertions. Consent to carry a broadcast signal will not offer that feature, barring, of course, the unlikely event that the broadcast industry and its program suppliers will redo their operational mode in order to come to terms with the new reality of the cable world.

Congress has with 1992 Act again withdrawn and handed Sticky Problems over to FCC; likelihood that Uneasy relationship between Broadcast and Cable will Persist

All of this is understandably troublesome. But railing against it will accomplish little. The Congress has spoken, is likely tired of the subject and unlikely to revisit it for clarifying purposes. The Congress, as it did with the original Communications Act when it directed regulation in the "public

interest," has again, in effect, said to the Commission: "We have a problem here; do something about it." And the Commission will have to live with it, even to replicating the experience of producing the volumes of interpretation and ruling that continue to define the meaning of "public interest." The Commission, then, will just have to do its best, but it is suspected that the problems in retransmission consent and must-carry will persist until the institutions of government face up to sober new truths.

CCA proposes that Alternate solution Looms

Candidly, broadcast television, if it is to survive in meaningful fashion, absolutely requires that its signals be carried by cable, which is rapidly becoming the preferred means for distributing video. But, the proposition is arguably maintainable that cable should not have to make its expensive facilities available at the command of a broadcast competitor. And they do compete--now, for example, for local and national advertising. That clash of realities breeds the persistent dilemma of how to keep these media flourishing at the same time with a minimum of government handling. Is there a way out of the stalemate? The Competitive Cable Association believes that government may have created the problem, and may be in a position, with small adjustment, to advance on a solution. "Adjustment" is probably inexact; getting out of the way, as explained next, is more what the Association has in mind.

Broadcasting should be Permitted to Own Cable Systems; it absolutely Needs cable coverage; but its right to Demand carriage from Existing System is Arguable

The Congress in the 1984 Cable Act codified the existing Commission regulation that bars the cross-ownership of broadcast and cable TV within the Grade B contour of the broadcast station. The original point of the restriction was to insure against broadcast TV's stalling the development of cable in the interest of preserving its own over-the-air dominance. But the passage of time has outdistanced whatever early merit there might have been in that limitation. Simply, the eminence of cable TV is now established, and the cross-ownership ban against broadcast TV is no longer just harmlessly useless--it is now an absolute deterrent to a reasonable accommodation in this running engagement.

Broadcasting not Excluded from Wireless Cable; Proscription against Entry into wired cable Inconsistent and now Outdated

Consider, for example, that in adopting the cross-ownership proscriptions in the more recent establishment of the wireless cable service, the Commission did not exclude broadcasters. §§21.900, et seq. Nor does there seem to be any disposition to shut broadcasting out of the proposed new 28 GHz wireless technology. See FCC News, Report No. DC-2284, Dec. 10, 1992. Respectfully, CCA suggests that the durability of the regulatory taboo against cable ownership probably has more to do with omission and neglect than with proposed choice.

Elimination of Cross-ownership Ban would also Conduce to Resolving Cable's Monopoly Dilemma

If broadcast TV were allowed to own its own cable facilities, it could ensure its carriage on cable. (And a useful further step would allow all local broadcasters to join together to construct and operate their own local cable facility). That single, simple step of getting government out of the way suggests serious possibilities of curing the retransmission consent/must-carry squabble. Not to be overlooked, in this evaluation, is the likelihood that removing the roadblock to broadcast TV's engagement in cable ownership would also serve to induce competition to the established cable industry, which at bottom is the core point of the entire recent fuss that led to the 1992 Cable Act.

CCA's recommendation contemplates Return to Congress for Elimination of Cross-ownership Limitation

The Competitive Cable Association is not overlooking the circumstance that it is recommending that the Commission return to the Congress for relief from the 1992 Cable Act, and that only paragraphs ago the Association was acknowledging that the Congress is probably weary of dealing with the subject. But retransmission consent/must-carry is due for early judicial airing and, if precedent holds, may go down in the first part of next year. Such an event would, of course, give life to a recommendation by the Commission to the Congress that the broadcast/cable cross-ownership be re-examined. Apart from that possibility, however, the

Commission may wish to consider an appeal to the Congress based on a plea that implementing retransmission consent and must-carry is fraught with almost irreconcilable conflict, that other route is available--i.e., the encouragement of broadcast entry into cable ownership and into the cable competition, and that contending with the current state of affairs is undermining the ability of the Commission to carry out its other regulatory functions. With respect to the latter circumstance, we politely sense that completing the admittedly difficult task of timely publishing the various Notices will seem trifling compared to resolving the hundreds of close questions about which the Notices, on occasion almost despairingly, entreat help.

Respectfully submitted,

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